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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. [redacted] 83

LEO LICHTENSTEIN, LIBBIE LICHTENSTEIN and BYRON J. LICHTENSTEIN, individually and trading as Harlich Manufacturing Company and Loomis Manufacturing Company,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

PAGE

Petition for writ of certiorari 1
Summary statement of the matters involved 2
The questions presented 3
Reasons relied on for the allowance of the writ 4
Brief in support of writ 6
Grounds on which the jurisdiction of this Court is invoked 6
Statement of the facts 7
Specification of errors intended to be argued 9
Summary of argument 10
Argument 11
The decision herein is in conflict with this Court's decision in the case of F. T. C. v. Bunte Bros., 312 U. S. 349 11
The furnishing to others the means to violate the F. T. C. Act is not within said act 13
This proceeding is not to the interest of the public 19
The F. T. C. Act is unconstitutional 21

AUTHORITIES.

Charles A. Brewer and Sons v. F. T. C., 158 F. (2d) 74 .. 11
California Rice Industry v. F. T. C., 102 F. 2d 716 4
Canfield Oil Co. v. F. T. C., (C. C. A. 6th) 274 Fed. 571 5
F. T. C. v. Bunte Bros., 312 U. S. 349 .....
.....2, 3, 4, 9, 11, 12, 13, 15, 17, 18, 20, 21
F. T. C. v. Klesner, 280 U. S. 19 .....3, 4, 17
F. T. C. v. Mid West Mills, (C. C. A. 7) 90 F. 2d 723 4

PAGE

F. T. C. v. Raladam Co., 283 U. S. 643 .....3, 4, 17, 19

F. T. C. v. Keppel & Bro., 291 U. S. 304 .....12, 13

Globe Cardboard Novelty Co. v. F. T. C., 192 F. (2) 444 .....11, 12

Schechter Poultry Corporation v. U. S., 295 U. S. 495 .....2, 3, 4, 9, 11, 15

Utah-Idaho Sugar Co. v. F. T. C., (C. C. A. 8) 22 F. 2d 122 5

Winslow v. F. T. C., 277 Fed. 206 5

STATUTES.

Federal Trade Commission Act, 52 Stat. 111, 15 U. S. C. A. Sec. 45 .....3, 4, 6, 7, 9, 12, 13, 15, 16, 17, 18

Judicial Code, 28 U. S. C. A., Sec. 347—I 6

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Leo Lichtenstein, Libbie Lichtenstein and Byron J. Lichtenstein, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered February 5, 1952. Petition for rehearing denied February 27, 1952. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A., Sec. 347). This case is reported in 194 F(2) 607. (R. 162)

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The first matter present herein, is that this Court in the case of the *Federal Trade Commission* v. *Bunte Brothers,* 312 U. S. 349 held that the intrastate use of chance to distribute merchandise is not within the purview of the Federal Trade Commission Act and not within the jurisdiction of the Commission. This Court, also, held in the case of *Schechter Poultry Corporation* v. *U. S.,* 295 U. S. 495 that the intrastate sales of merchandise are not within the power granted Congress. Contrary to these two decisions by this Court, the The Circuit Court of Appeals in this case held that the intrastate use of a chance device to distribute merchandise is within the purview of said statute and is within the jurisdiction of the Commission. Basing its decision on this erroneous principle of law the court, also, held that the Commission has jurisdiction to issue a cease and desist order against petitioners preventing them from shipping in interstate commerce chance devices which are to be used in the intrastate distribution of merchandise.

The order issued herein as affirmed by the Court is as follows, to wit:

> It is ordered that the respondents (petitioners here) do forthwith cease and desist from:
>
> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices, which are to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

The second matter involved is that the decision herein holds also contrary to and in direct conflict with this Court's holding in the *Bunte* Case, *supra,* that it is to

the interest of the public, as provided in the Federal Trade Commission Act, for the Commission to conduct proceedings which have for their purpose the prevention of the use in intrastate commerce of gambling devices in the sale of merchandise to the ultimate consumer.

The third matter involved herein is that the decision herein by the Circuit Court holds that the Commission has jurisdiction to stop the aiding, abetting, inducing, and procuring of a violation of the Federal Trade Commission Act. This the petitioners contend is contrary to the rule of strict construction as announced by this Court in the cases of: *Federal Trade Commission* v. *Bunte Bros., Supra, Federal Trade Commission* v. *Klesner,* 280 U. S. 19, and *Federal Trade Commission* v. *Raladam,* 283 U. S. 643.

The fourth matter involved herein is that the Federal Trade Commission Act (52 Stat. 111., 15 U.S.C.A. Sec. 45.) is unconstitutional.

QUESTIONS PRESENTED.

1.

The decision in this case is contrary to and in direct conflict with this Court's decision in the cases of *Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, and the *Schechter Poultry Corporation* v. *U. S.,* 295 U. S. 495.

2.

The Commission's jurisdiction is limited to the preventing of the "use" of unfair methods of competition in commerce.

Federal Trade Commission v. *Raladam Co.,* 283 U. S. 643.

Federal Trade Commission v. *Klesner*, 280 U. S. 19.

Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349.

3.

This proceeding is not to the interest of the public as required by Sec. 5 of the Federal Trade Commission Act.

Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643.

4.

The Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Sec. 45, is unconstitutional.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Ninth Circuit in this case decided a federal question in a way probably in conflict with applicable decisions of this Court.

The decision in this case is contrary to and in direct conflict with the decisions of this Court in the cases of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, *and Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495.

2.

The decision herein is in conflict with the decisions of other Circuit Court of Appeals on the same matter.

Federal Trade Commission v. *Mid West Mills*, (C. C. A. 7), 90 F. (2) 723, 724.

California Rice Industry v. *Federal Trade Commission*, 102 F. (2d) 716.

Winslow v. *Federal Trade Commission* (C.C.A. 4th), 277 Fed. 206.

Utah-Idaho Sugar Co. v. *Federal Trade Commission* (C.C.A. 8th), 22 F. (2d) 122, 125.

Canfield Oil Co. v. *Federal Trade Commission* (C.C.A. 6th), 274 Fed. 571, 575.

All of the above cases hold that intrastate transactions are not within the purview of the Federal Trade Commission Act, therefore, are not within the jurisdiction of the Commission. The case at bar holds to the contrary.

3.

The decision herein has decided important questions of Federal Law which have not been, but should be, settled by this Court:

1. That the word *"using"* as used in the Federal Trade Commission Act can be construed to include "contributing to".

2. That a proceeding by the Commission to eliminate the intrastate use of a chance device to distribute merchandise is to the interest of the public as provided for in Sec. 5 of the Federal Trade Commission Act.

It is respectfully submitted that a writ of certiorari should issue in this matter.

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Of Counsel:
George E. Lindelof, Jr.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This case comes before the Court on a petition for certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit wherein an order to cease and desist issued by the Federal Trade Commission against petitioners based on Sec. 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Sec. 45. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A., Sec. 347).

STATEMENT OF THE CASE.

The petitioners manufacture push cards and punch boards, selling and distributing them in interstate commerce to manufacturers of and dealers in, various other articles of merchandise. Some of the push cards and punchboards are so prepared that when used by persons others than petitioners in distributing merchandise to the consuming public they involve games of chance.

Many persons who sell and distribute candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in interstate commerce purchase Petitioners' push cards and punchboards, pack and assemble them together with merchandise and sell them to retail dealers. Other retail dealers purchase the cards and boards directly from Petitioners and make up their own assortments.

The retailers distribute the merchandise to the purchasing public by means of the push cards and punchboards.

The element of chance involved induces members of the purchasing public to deal with such retailers and this in turn induces retailers to deal with manufacturers and wholesalers who assemble their merchandise with the push cards and punchboards.

The respondents thus supply to, and place in the hands of persons, firms, and corporations the means of and instrumentalities for, engaging in unfair methods of competition in commerce and unfair acts and practices in commerce within intent and meaning of the Federal Trade Commission Act.

Petitioners' answer amounts to a general denial.

Statement of the Facts.

Petitioners manufacture punchboards, and push cards which they sell to other persons, firms and corporations. Some of petitioners' products are used to distribute merchandise. The only persons, firms or corporations who use punchboards as chance devices to distribute merchandise are persons, firms and corporations who are engaged exclusively in intrastate commerce.

The complaint does not allege that the intrastate use of punchboards to distribute merchandise is a violation of the F.T.C. Act nor is there an allegation that the shipping of punchboards which are used exclusively in intrastate commerce is a violation of the said statute.

The order is as follows, to wit:

It is ordered that the respondents do forthwith cease and desist from:

Selling or distributing in commerce as commerce is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices, which are to be used, or may be used, in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

SPECIFICATION OF ERRORS INTENDED TO BE ARGUED.

1.

The decision in this case is contrary to and in direct conflict with the court's decision in the cases of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, and the *Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495.

2.

The Commission's jurisdiction is limited to the preventing of the "use" of unfair methods of competition in commerce or unfair or deceptive acts or practices.

3.

This proceeding is not to the interest of the public as required by Sec. 5 of the Federal Trade Commission Act.

4.

The Federal Trade Commission Act, 52 Stat. 11, 15 U.S.C.A. Sec. 45 is unconstitutional.

SUMMARY OF ARGUMENT.

Our first point is that this Court in the *Bunte* Case held that the intrastate use of a chance device to distribute merchandise is not within the jurisdiction of the Commission, while on the other hand, the decision in the case at bar holds to the contrary, that such acts are within the jurisdiction of the Commission.

Our second point is that the Commission's authority is limited to the preventing of unfair methods, acts or practices used in the selling of merchandise; it does not have the authority to stop the selling of merchandise. Our points being that the order issued herein is not against the using of any unfair methods, acts or practices which are used to sell merchandise, but it is issued against the selling of merchandise.

Our third point is that because the Congress did not give the Commission authority to prevent the intrastate use of a chance device to distribute merchandise, a proceeding having for its purpose the prevention of such transactions is not to the interest of the public as required by the statute.

Our fourth point is that the statute is unconstitutional because it is a wrongful delegation of legislative power.

ARGUMENT.

Petitioners' first point is that the decision in the case at bar by the United States Circuit Court of Appeals is contrary to and in direct conflict with the court's holding, in the cases of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 and *Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495.

This Court in the *Bunte* case held that the *intrastate* use of a chance device to distribute merchandise is not within the purview of the Federal Trade Commission act, therefore, the Commission does not have jurisdiction over such transactions. The decision herein holds just the contrary, that the intrastate use of a chance device to distribute merchandise is within the purview of the said statute, therefore, the Commission has jurisdiction over such transactions.

The case of *Schechter* v. *U. S., supra,* held that the Congress does not have power to regulate the intrastate sale of merchandise. There is no finding of fact nor any contention made that the intrastate use of a chance device to distribute merchandise has any effect on interstate commerce, the fact is that it does not.

The Court of Appeals in its decision in this case relied upon two other circuit court cases, *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F.(2) 444; and *Charles A. Brewer and Sons* v. *Federal Trade Commission,* 158 F.(2) 74. Both of these cases either ignored the principle of law announced by this Court in the *Bunte* Case, *supra,* or just refused to follow it.

In the case of *Globe Card and Novelty Co.* v. *Federal Trade Commission,* 192 F. (2d) 444, the Third Circuit Court said:

> "Since the decision of the Supreme Court in *Federal Trade Comm.* v. *Keppel & Bro.,* 291 U.S. 304 (1934), it has been settled law that the sale of merchandise by lottery methods constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act."

This interpretation of the *Keppel* case is not only an erroneous interpretation of that case but the principle of law as stated by the Third Circuit is contrary to and in direct conflict with the holding in the *Bunte* Case. The *Bunte* Case held that the intrastate sale of merchandise by lottery methods does not constitute unfair methods of competition under Section 5 of the Federal Trade Commission Act.

At this point it is well to note that it is conceded that all sales of merchandise by lottery methods are exclusively intrastate transactions. On this point in this case the Ninth Circuit says:

> "The Commission's brief here admits concerning the place in which the gambling sales are consummated to the ultimate consumer that: 'It is true that the final sale to the ultimate purchaser by means of lottery of necessity, always occurs in intrastate commerce and is an intrastate transaction.'"

Bearing in mind that all sales of merchandise by lottery methods to the public are strictly intrastate transactions we return to a discussion of the above quotation from the *Globe* case. The *Keppel* case did not settle that the sale of merchandise to the public by lottery method constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act. The Su-

preme Court in that Case simply held that under the findings of the Federal Trade Commission the interstate shipments of "break and take" because of their adverse effect upon interstate competitors is an unfair method of competition within Section 5 of the Federal Trade Commission Act. The holding in that case is limited strictly to interstate transactions and the effect such acts had upon competitors in interstate commerce.

Some time after the *Keppel* case this Court in the case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 held that the intrastate sale and distribution of merchandise by lottery methods did not constitute unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act, therefore, when the Third Circuit Court of Appeals ruled that the *Keppel* case held that such transactions were a violation of the Federal Trade Commission Act it ignored the holding in the *Bunte* case and in reality overruled this Court.

The situation is that this Court has held that the intrastate use of a chance device in the distribution of merchandise is not a violation of the Federal Trade Commission Act and that contrary to and in direct conflict with this holding the decision by the Circuit Court of Appeals herein holds that such use is a violation of said statute. Under such a situation it seems that this Court should not hesitate to issue a writ of certiorari.

The Supplying to or Placing in the Hands of Others Chance Devices for Engaging in Unfair Methods of Competition and Unfair Acts and Practices Within the Intent and Meaning of the Federal Trade Commission Act Is Not Within the Purview of Said Act.

This is the question of federal law which has not been, but should be settled by this Court.

The basic allegation of the complaint is alleged as follows, to wit:

> "The respondents thus supply to, and place in the hands of, said person, firms and corporations the means of, and instrumentalities for, engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act." (R. 8)

The order issued herein is as follows, to wit:

> "It is ordered that the respondents, Leo Lichtenstein, Libbie Lichtenstein, and Byron J. Lichtenstein do forthwith cease and desist from:
>
> "Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices, which are to be used, or may be used, in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme." (R. 44)

It is conceded by the Commission and in the opinion of the Circuit Court that the petitioners ship just chance devices in interstate commerce to people who use them exclusively in intrastate commerce, that is, the petitioners ship a chance device, a punch board, to a local tavern or pool hall, or similar places, where they are used to distribute merchandise which merchandise the users of said devices have purchased not from petitioners but from some other source.

There is no contention made by the Commission nor does the Circuit Court in its decision contend that the complained of acts of the petitioners are in any way, directly or indirectly, harmful or unfair to their competitors or that said acts are deceptive or unfair to petitioners' customers, to consumers, or to anybody else.

The sole ground upon which the decision is based is that petitioners place in the hands of others a chance device which is used in connection with the violation of the Federal Trade Commission Act.

As the order restrains the petitioners from shipping their chance devices to people who use them exclusively in intrastate transactions, the decision in this case is based upon the principle of law that the intrastate use of a chance device is a violation of the Federal Trade Commission Act. As stated above, this holding by the Circuit Court of Appeals is contrary to and in direct conflict with this Court's decision in the cases of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 and *Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495.

What we wish to do here is to make two points. The first one is that this principle of law that we are discussing under this heading has no application to the case at bar, because most of petitioners' customers use the boards exclusively in intrastate commerce and under the Bunte decision these people do not violate the Federal Trade Commission Act. This makes it self evident that when petitioners furnish a chance device to a person who uses it strictly in intrastate commerce the petitioners are not supplying to or placing in the hands of these people the means of, and instrumentalities for engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act. Just to make our position clear let us say that these people to whom the devices are furnished under these circumstances, as held by this Court in the *Bunte* case, do not use the boards to engage in unfair methods of competition or unfair acts or practices within the intent and meaning of the Federal Trade Commission Act.

The second point we wish to make here is that as the Federal Trade Commission Act provides that the Commission can prevent only the *"using"* of unfair method of competition, and unfair or deceptive acts and practices the Commission under the rule of strict construction as set out in the above cases does not have jurisdiction over the doing or committing of acts as distinguished from the *using* of acts. The Commission has no jurisdiction over the doing of an act such as just the act of selling an article of merchandise; its jurisdiction is limited to the *using* of some trade method, act, or practice to make the sale. On this point the statute provides: (Sec. 5 of the Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Sec. 45.)

> "(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is *using* any unfair method of competition or unfair or deceptive act or practice in commerce, * * * it shall issue * * * complaint * * *." (Emphasis provided)

What we wish to make clear is that Congress advisedly and intentionally used only the word "using" so that the Commission's authority would be limited to methods, acts, and practices which are resorted to for the sole purpose of selling goods. In other words it is the method of selling which the Commission has power to prevent not the mere selling of a commodity. Congress never intended to give the Commission authority to stop the mere selling of a commodity even though the commodity might be one which it would be to the benefit of the public to have off the market. In other words the Commission does not have jurisdiction to prohibit the selling of a commodity because of some inherent quality of the merchandise which makes it undesirable from the

standpoint of the morals of the public. The sole purpose of the act is to protect competitors and consumers, as we said above, not from the commodity itself but only from the methods, acts, or practices which are employed in the selling of the commodity. If the Commission's authority is not limited as we have indicated herein, to the preventing of the use of, methods, acts and practices, but is enlarged to include the power to prevent the mere selling of articles of merchandise which merchandise may seem to the Commission should be taken off the market the Commission's authority will go far beyond the limits that Congress intended it should be confined within.

On the question of the construction of the F. T. C. Act, this Court through Justice Frankfurter had this to say in the *Bunte* case *supra*:

> "While one may not end with the words of a disputed statute, one certainly begins there."

and this to say in the case of *F. T. C.* v. *Raladam Co.*, 283 U. S. 643:

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

and this to say in the case of *F. T. C.* v. *Klesner*, 280 U. S. 19:

> "* * * the scope of its (the Commission) authority is strictly limited."

These cases certainly establish beyond doubt that the F. T. C. Act must be subjected to the strictest construction.

We wish to emphasize what Justice Frankfurter said in the *Bunte* case; "While one may not end with the words of a disputed statute, *one certainly begins there.*" (Emphasis provided)

As the jurisdiction of the Commission is limited by the wording of the statute creating it, to the preventing of the "using" of unfair methods of competition and unfair acts and practices the word "using" as used in the statute can not be, as was done by the Circuit Court herein, construed to give the Commission jurisdiction over the aiding, abetting, procuring, and inducing of such acts or the supplying to and placing in the hands of others the means of, and instrumentalities for, engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act. Such an interpretation of the statute by the Circuit Court of Appeals is clearly contrary to the rule of strict construction as laid down by this Court in the three cases cited above.

As this Court in the *Bunte* case, *supra,* settled beyond question, that the word "in" was used in the said statute cannot be interpreted to include or mean "affecting", the word "using" as used in the statute cannot be interpreted to mean aiding, abetting, procuring and inducing or the supplying to or placing in the hands of others.

From what has been said above on this point we feel that it is self evident that the Commission does not have jurisdiction of the selling or furnishing a chance device to other people even though the other party is going to use the said device in connection with the distribution of merchandise in such a way as to violate the Federal Trade Commission Act.

This Proceeding Is Not to the Interest of the Public As Required by Section 5 of the Federal Trade Commission Act.

On this point the statute provides as follows, to wit:

> "(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public,* it shall issue * * * complaint * * *." (Emphasis provided)

Discussing this phrase of the statute this Court in the case of *Federal Trade Commission* v. *Raladam,* 283 U. S. 643, held unequivocally that the provision of the statute requiring that proceedings by the Commission must be to the interest of the public is not a part of the substantive protection provided by the act, but is a limitation on the protective power and jurisdiction granted. The Court, page 648, says:

> "By these additional words, (*and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public,*) protection to the public interest is made of paramount importance but, nevertheless, they are not substantive words of protection, but complimentary words of limitation beyond the jurisdiction conferred by the language immediately preceding."

From this statement it is clear that the only concern the public interest has to do with the jurisdiction of the Federal Trade Commission is the interest the public has in the elimination of the practice of using the unfair method, act, or practice in the selling of a commodity, that is the elimination of the using of said method, act, or practice

must be to the interest of public as distinguished from just a private interest. Congress certainly did not intend to provide that it would be to the interest of the public for the Federal Trade Commission to proceed against a method, act, or practice even though it is unfair, which act, method, or practice is not within the purview of the Federal Trade Commission Act. In other words if the Congress did not give the commission jurisdiction over a certain method, act, or practice a proceeding against such method, act, or practice cannot be said to be in the interest of the public.

The Circuit Court in this case said on this point:

> "Petitioner further urges that the prevention of the use of its gambling devices in the sale of merchandise to the ultimate consumer is not in the public interest. We find no merit in this contention."

This statement by the Court makes it clear that the holding of the Court is that the interest the public has in a proceeding to prevent the intrastate use of gambling devices in the sale of merchandise to the ultimate consumer is sufficient to satisfy the provision in the statute on this point. As we have shown herein above that this Court in the *Bunte* case held that such transactions are not within the jurisdiction of the Federal Trade Commission, a proceeding to prevent these acts is not in the public interest as required by the statute. In other words we construe the *Bunte* decision in holding that the intrastate use of gambling devices in the sale of merchandise is not within the purview of the Federal Trade Commission Act, that a proceeding to prevent such transactions would not be to the interest of the public as required by the said statute. Therefore when the Ninth Circuit Court held that such a proceeding was to the interest of the

public as required by the said statute its holding is contrary to and in direct conflict with the holding on this point in the *Bunte* case.

The Federal Trade Commission Act, 52 Stat. 111, 15 U.S.C.A. Section 45, Is Unconstitutional.

Under this statute before its amendment the order of the Commission was never operative; before any order had any effect, the proceedings by the Commission had to be reviewed by a circuit court of appeals and when this was done it was not the Commission's order that became operative but the court issued it's own order which became the only operative order. Since the amendment this is not the situation. Now it is the order of the Commission which is enforced, not an order of a court. Under the statute now if the proceedings of the Commission is not taken before a court within 60 days after it is rendered the order becomes final and can be enforced; if it is taken before a court the court on review only affirms the Commission's order and the Court merely orders that the order of the Commission be obeyed.

Therefore, since the amendment the Commission's order is legislative being a rule of conduct. Such a situation is identical with a statute which provides that only Mr. A cannot do a certain act leaving the commission of the same act free from penalty enforcement when done by all other people. Such a condition is clearly in conflict with the equal protection clause of the constitution. It might be contended that the same situation was present under the act before its amendment but this is not correct. Before the amendment it was an order of a court enforced by contempt proceedings; the only one that had power to enforce the order was the court that issued it.

Whereas, now the Federal Trade Commission order is made the basis of an action at law by the United States Government to collect a penalty, which action is prosecuted in any federal district court. This difference is sufficient to make the statute come within the condemnation of the equal protection clause of the constitution.

CONCLUSION.

Wherefore, petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to It for review and determination, issue Its writ of certiorari to review the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment, and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:

Charles A. Brewer & Son v. *Federal Trade Commission*, 158 F. 2d 74	9
Chicago Silk Co. v. *Federal Trade Commission*, 90 F. 2d 689, certiorari denied, 302 U.S. 753	6
Deer v. *Federal Trade Commission*, 152 F. 2d 65	9
Federal Trade Commission v. *A. McLean & Son*, 84 F. 2d 910, certiorari denied, 299 U.S. 590	6
Federal Trade Commission v. *Bunte Bros., Inc.*, 312 U. S. 349	9, 10
Federal Trade Commission v. *F. A. Martoccio Co.*, 87 F. 2d 561, certiorari denied, 301 U.S. 691	6
Federal Trade Commission v. *Keppel & Bro., Inc.*, 291 U.S. 304	5, 7, 8, 9
Federal Trade Commission v. *Raladam Co.*, 283 U.S. 643	7
Federal Trade Commission v. *Raladam Co.*, 316 U.S. 149	7
Federal Trade Commission v. *Winsted Hosiery Co.*, 258 U.S. 483	8
Globe Cardboard Novelty Co. v. *Federal Trade Commission*, 192 F. 2d 444	9
Hamilton Mfg. Co. v. *Federal Trade Commission*, 194 F. 2d 346	9
Helen Ardelle, Inc. v. *Federal Trade Commission*, 101 F. 2d 718	6
Hill v. *Federal Trade Commission*, 124 F. 2d 104	6
Hofeller v. *Federal Trade Commission*, 82 F. 2d 647, certiorari denied, 299 U.S. 557	6
Jaffe v. *Federal Trade Commission*, 139 F. 2d 112, certiorari denied, 321 U.S. 791	6
Johnson Candy Co. v. *Federal Trade Commission*, 78 F. 2d 717	6
Koolish v. *Federal Trade Commission*, 129 F. 2d 64, certiorari denied, 317 U.S. 683	6
Kritzik v. *Federal Trade Commission*, 125 F. 2d 351	6

Cases—Continued

	Page
Lee Boyer's Candy v. *Federal Trade Commission*, 128 F. 2d 261	6
Loughran v. *Federal Trade Commission*, 143 F. 2d 431	6
Minter v. *Federal Trade Commission*, 102 F. 2d 69	6
Modernistic Candies, Inc. v. *Federal Trade Commission*, 145 F. 2d 454	9
National Candy Co. v. *Federal Trade Commission*, 104 F. 2d 999, certiorari denied, 308 U.S. 610	6, 10
Ostler Candy Co. v. *Federal Trade Commission*, 106 F. 2d 962, certiorari denied, 309 U.S. 675	6
Piuma v. *United States*, 126 F. 2d 601, certiorari denied, 317 U.S. 637	10
Wolf v. *Federal Trade Commission*, 135 F. 2d 564	6

Statutes:

Act of January 2, 1951, 64 Stat. 1134, 15 U.S.C., Supp. IV, 117 *et seq.*	9, 10
Federal Trade Commission Act, 38 Stat. 717, Sec. 5, as amended, 52 Stat. 111, 15 U.S.C. 45	2

Miscellaneous:

H. Rep. No. 2769, 81st Cong., 2d Sess.	9
S. Rep. No. 221, 75th Cong., 1st Sess.	7
S. Rep. No. 1482, 81st Cong., 2d Sess.	9

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 83

LEO LICHTENSTEIN, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 162) is reported in 194 F. 2d 607.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1952, and a timely petition for rehearing was denied on February 27, 1952 (R. 172-174). The petition for a writ of certiorari was filed on May 26, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

The principal question presented is whether interstate sales of punch boards and other lottery devices which are to be used by the ultimate purchasers in selling merchandise to the general public by means of games of chance and other lottery schemes constitute unfair acts or practices in interstate commerce within the meaning of Section 5 of the Federal Trade Commission Act.

Other questions which are presented are whether a proceeding against such practices is "to the interest of the public" and whether Section 5 of the Federal Trade Commission Act is constitutional.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and

> if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect * * *.

STATEMENT

This is a proceeding under Section 5 of the Federal Trade Commission Act. The findings of the Federal Trade Commission are not disputed. The findings which are presently material may be summarized as follows:

Petitioners are co-partners who have been engaged for a number of years in the manufacture and sale in interstate commerce of punch boards and push cards designed for use by retail dealers in selling merchandise to the general public by means of a game of chance. The boards and cards all involve the same general principle. A person wishing to "play" the board pays a specified sum for the privilege of punching the board and removing from it a slip of paper. If the paper so obtained bears a winning number, the purchaser receives without additional cost a designated article of merchandise; if his paper does not carry a winning number, he gets nothing or, in some cases, merchandise of much less value. (R. 34-35.)

Many of petitioners' boards and cards carry pictures and descriptions of the articles of merchandise, such as candy, cigarettes, cigarette lighters, etc., awarded as prizes to those who draw lucky

numbers. Other boards and cards have blank spaces in which the purchaser of the device may insert his own instructions and statement as to the merchandise awarded as prizes, and some of the boards have a hole or depression in which a sample of the merchandise offered by the dealer may be exhibited. Many of the boards and cards are made to order to meet the requirements of particular purchasers. (R. 36.)

Manufacturers, jobbers and wholesalers of various articles of merchandise purchase petitioners' boards and cards and make up assortments consisting of the board or card and certain merchandise (R. 37). They sell the merchandise so packed and assembled to retailers for resale to the public (*ibid.*). Petitioners thus furnish to others the means for selling merchandise through the medium of games of chance (R. 40).

Because of the element of chance involved, members of the purchasing public have been induced to trade or deal with retailers employing petitioners' boards or cards, and many retailers have been induced to purchase from manufacturers, jobbers and wholesalers who sell their products together with these boards or cards (R. 40). Trade is thereby frequently diverted from manufacturers, jobbers and wholesalers who do not use lottery devices in promoting sale of their merchandise (R. 41). Sale of goods through the use of petitioners' boards and cards encourages gambling, "to the prejudice of the public," and is contrary to established public policy (*ibid.*).

The Commission concluded that the acts and practices of the petitioners, as set forth in its findings, constitute unfair methods of competition and unfair acts and practices in interstate commerce within the meaning of the Federal Trade Commission Act (R. 41-42). The order entered by the Commission directed petitioners to cease and desist from selling in interstate commerce punch boards, push cards or other lottery devices which "are to be used" in the sale or distribution of merchandise to the public by means of "a game of chance, gift enterprise, or lottery scheme" (R. 44). The court of appeals unanimously upheld the validity of this prohibition (R. 162-174).

ARGUMENT

I

We submit that this case is governed in every essential respect by *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U.S. 304 (1934). That case upheld the validity of a Commission order directed against interstate sales of "break and take" candy, arranged so that the purchaser of an individual piece in a retail store might, depending upon chance, get his money back or a "prize," or pay a higher or lower price for his purchase. This Court said that it could see no essential difference under the statute between employing the element of chance as a sales appeal and employing an element of deception through misleading labeling; that devices whereby the return for one's money is dependent upon chance have "met with

condemnation throughout the community" and have long been deemed "contrary to public policy"; and that to hold them not to be "unfair" within the meaning of the Act would be "a gross perversion of the normal meaning of the word." 291 U.S. at 313.

Orders of the Commission directed against interstate distribution of goods or products designed to promote sale at retail to consumers by appeal to the gambling instinct have been repeatedly before the various court of appeals. These orders have been universally sustained; indeed, certiorari has already been denied eight times in such cases.[1]

Prior to 1938, the statute prohibited "unfair methods of competition." To establish a violation, there had to be a showing that the unfair

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[1] *Hofeller* v. *Federal Trade Commission*, 82 F. 2d 647 (C.A. 7), certiorari denied, 299 U.S. 557; *Federal Trade Commission* v. *A. McLean & Son*, 84 F. 2d 910 (C.A. 7), certiorari denied, 299 U.S. 590; *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. 2d 561 (C.A. 8), certiorari denied, 301 U.S. 691; *Chicago Silk Co.* v. *Federal Trade Commission*, 90 F. 2d 689 (C.A. 7), certiorari denied, 302 U.S. 753; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (C.A. 7), certiorari denied, 308 U.S. 610; *Ostler Candy Co.* v. *Federal Trade Commission*, 106 F. 2d 962 (C.A. 10), certiorari denied, 309 U.S. 675; *Koolish* v. *Federal Trade Commission*, 129 F. 2d 64 (C.A. 7), certiorari denied, 317 U.S. 683; *Jaffe* v. *Federal Trade Commission*, 139 F. 2d 112 (C.A. 7), certiorari denied, 321 U.S. 791; *Johnson Candy Co.* v. *Federal Trade Commission*, 78 F. 2d 717 (C.A. 7); *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718 (C.A. 9); *Minter* v. *Federal Trade Commission*, 102 F. 2d 69 (C.A. 3); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104 (C.A. 5); *Kritzik* v. *Federal Trade Commission*, 125 F. 2d 351 (C.A. 7); *Lee Boyer's Candy* v. *Federal Trade Commission*, 128 F. 2d 261 (C.A. 9); *Wolf* v. *Federal Trade Commission*, 135 F. 2d 564 (C.A. 7); *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431 (C.A. 8); and cases cited in note 2, *infra*, p. 9.

methods were injurious to competitors although a showing of specific losses to particular competitors was not required. *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643; *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149, 152. Under the prohibition of "unfair or deceptive acts or practices," added to Section 5 by the Wheeler-Lea Act (52 Stat. 111) in 1938, the Commission is authorized to stop practices "unfair or deceptive to the public generally, * * * regardless of their effect upon competitors." S. Rep. No. 221, 75th Cong., 1st Sess., p. 2. The "unfair" acts and practices thus prohibited are at least as broad in scope as the "unfair" methods of competition with which the original Act dealt. In the instant case, therefore, it is immaterial whether or not petitioners' practices are injurious to their competitors. It is enough that they are "unfair" to the general consuming public, in the sense that they involve practies of a kind condemned both by law and the mores of the community.

Petitioners' basic contention (Pet. 11-18) seems to be that their conduct was deemed unfair only because their boards and cards were used to promote sale of goods on a gambling basis; that such sales are wholly intrastate; and that therefore they engaged in no unfair act or practice "in" interstate commerce and did not violate the Act. But when, as here, devices for effecting sales to the consuming public by "unfair" means are sold and distributed in interstate commerce, there plainly is an unfair act in interstate commerce. In *Keppel*

the unfair aspect of the respondent's conduct consisted in providing retailers with means for selling in intrastate commerce through appeal to the gambling instinct, but the unfairness was held to attach to the prior interstate movement of the goods. In so far as the relationship to commerce is concerned the situation here is the same.

The early case of *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, seems dispositive of petitioners' contention. In that case a manufacturer used labels which tended to deceive a substantial part of the consuming public, but not the dealers to whom the manufacturer sold. The deception which caused the manufacturer's conduct to be "unfair" therefore occurred only in intrastate sales, but the Act was held to be violated. This Court said (p. 494):

> The honest manufacturer's business may suffer * * * through the competitor's *putting into the hands of the retailer an unlawful instrument*, * * *. That *a person is a wrongdoer who so furnishes another with the means of consummating a fraud* has long been a part of the law of unfair competition. [Italics supplied.]

In the *Keppel* case the respondent used gambling devices to promote sale of its own product to consumers, and it furnished all the means for selling by means of a game of chance. Here, petitioners supply to others devices for so selling and the devices are used to promote sale of the goods of those who purchase the devices. Petitioners

thus aid and abet conduct of a kind prohibited by the Act. It lies within the power of the Commission to find that such aiding and abetting is an unfair act or practice within the ban of Section 5 of the Act. See *Keppel* case, *supra,* at p. 314. The courts of appeals for the Second, Third, Sixth, Seventh, and District of Columbia Circuits have so applied the Act, without a single dissenting vote.[2] In the *Brewer, Globe Cardboard* and *Hamilton* cases the practices involved were precisely the same as those here, namely, supplying gambling devices to others for use by them in selling their products to ultimate consumers. Furthermore, as the court below noted (R. 168-169), Congress has indirectly placed its stamp of approval on the *Brewer* case. When Congress recently outlawed certain interstate shipments of gambling devices (Act of January 2, 1951, 64 Stat. 1134, 15 U.S.C., Supp. IV, 1171 *et seq.*), it took pains to preserve the authority of the Federal Trade Commission as exercised and upheld in the *Keppel* case and in the *Brewer* case.[3]

Petitioners rely upon *Federal Trade Commis-*

---

[2] *Modernistic Candies, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454, 455 (C.A. 7); *Deer* v. *Federal Trade Commission,* 152 F. 2d 65, 66 (C.A. 2); *Charles A. Brewer & Son* v. *Federal Trade Commission,* 158 F. 2d 74, 77-79 (C.A. 6); *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 444, 446-447 (C.A. 3); *Hamilton Mfg. Co.* v. *Federal Trade Commission,* 194 F. 2d 346 (C.A.D.C.). While the opinion in the *Hamilton* case discusses only the scope of the Commission's order, issues similar to those in the other cases were presented to the court by petitioner's statement of points and the briefs of the parties.

[3] See S. Rep. No. 1482, 81st Cong., 2d Sess., p. 4; H. Rep. No. 2769, 81st Cong., 2d Sess., pp. 9-10.

sion v. *Bunte Bros., Inc.*, 312 U.S. 349, which involved an order under Section 5 directed against a concern which sold only in intrastate commerce. The holding there that Section 5 is limited to practices employed "in" interstate commerce and does not extend to practices which merely affect such commerce has no application here. Petitioners sold their punch boards and push cards in interstate commerce, so that there is clear jurisdictional basis for the proceeding against them.

II

Although petitioners urge (Pet. 19-21) that the proceeding herein is not "to the interest of the public," the supporting argument is merely a renewal of the substantive contention, based on petitioners' interpretation of the *Bunte* case, *supra*, that petitioners' practices are not within the scope of Section 5 of the Act.

Petitioners also raise a question of constitutionality (Pet. 21-22), but without citation of authority or any showing that the question which is raised has substance. We deem it sufficient to refer to prior unsuccessful constitutional attacks based on the procedural changes in Section 5 made in 1938 by the Wheeler-Lea Act. See *Piuma* v. *United States*, 126 F. 2d 601 (C.A. 9), certiorari denied, 317 U.S. 637; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (C.A. 7), certiorari denied, 308 U.S. 610.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 85 383

LEO LICHTENSTEIN, LIBBIE LICHTENSTEIN and BYRON J. LICHTENSTEIN, individually and trading as Harlich Manufacturing Company and Loomis Manufacturing Company,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petitioners' Reply Brief

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INDEX

	PAGE
This Proceeding is in conflict with the Bunte case	1
The rule of aiding and abetting is not applicable to the Federal Trade Commission Act	16
The rule of aiding and abetting is in conflict with the case of Scientific Manufacturing Co.	18
There is a conflict among the Circuit Courts as to what principles should govern herein	19
Chas. A. Brewer & Son, F.T.C. 158 F. 2nd 74	11
F.T.C. v. Bunte, 312 U. S. 349	11
F.T.C. v. Keppel Bros., Inc., 291 U. S. 304	4
Modernistic Candy, Inc. v. F.T.C., 145 F. 2d 454	6, 9
Scientific Manufacturing Co. v. F.T.C.	18
U. S. v. Miller, 297 U. S. 1	2

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 85

LEO LICHTENSTEIN, LIBBIE LICHTENSTEIN and BYRON J. LICHTENSTEIN, individually and trading as Harlich Manufacturing Company and Loomis Manufacturing Company,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITIONERS' REPLY BRIEF.

This Proceeding is in Conflict with the Bunte Case.

The Commission's brief is an open and frank confession that the case at bar is an unjustifiable attempt on the part of the Commission to circumvent, side step, and annul the case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. It seems that in spite of what this Court held in the *Bunte* Case, the Commission has an uncontrollable desire to bring within its jurisdiction the entire field of intrastate commerce, even to the extent of including therein those intrastate transactions which have no effect on interstate commerce. To realize this desire the Commission in the *Bunte* case issued a complaint proceeding directly against an intrastate method of com-

petition. This Court in that case held that intrastate transactions are not within the Commission's jurisdiction. The Commission having been denied the right to proceed directly against intrastate transactions instigated this proceeding in an effort to accomplish indirectly that which this Court has held the Commission does not have jurisdiction to do directly.

This attempt is not only in direct conflict with the *Bunte* case but is, also, contrary to what this Court said in the case of *U. S.* v. *Miller*, 297 U. S. 1, at page 68.

> "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.
>
> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws *for the accomplishment of objects not intrusted to the government;* it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land! *McCulloch* v. *Maryland*, 4 Wheat 316, 423" (Italics provided)

Petitioners base the above comments on the fact that the Commission's brief sets forth and agrees with petitioners that the opinion of the Court below in this case is based and predicated solely upon the principle that the intrastate use of punch boards to distribute merchandise is a violation of the Federal Trade Commission Act and that being so petitioners because they furnish the punch boards, no other merchandise, so aid and abet, induce and procure these intrastate transactions that they themselves are within the purview of the act. Petitioners contention is that the above holding is contrary

to and in direct conflict with this Court's holding in the *Bunte* Case that these intrastate transactions are not a violation of the act. The *Bunte* case holds that there is no violation, therefore, there is no aiding, abetting, inducing and procuring.

A discussion of the Commission's brief will substantiate the above statement.

The Commission's first contention (page 5 of its brief) that this Court in the *Keppel* Case held that these intrastate transactions are a violation of the act is erroneous. (quoting from page 5:)

> "We submit that this case is governed in every essential respect by *Federal Trade Commission* v. *Keppel Bros., Inc.,* 291 U. S. 304 (1934)."

Thus it is clear that the petitioners rely on the *Bunte* case and the respondents rely on the *Keppel* Case. The following discussion, petitioners think, will make the correctness of their position and the fallacy of the Commission's position self-evident.

The claim that the *Keppel* Case is controlling herein, is based solely upon the erroneous theory and contention that the *Keppel* Case held, contrary to the *Bunte* Case, that these intrastate transactions are a violation of the act. The Commission in its effort to substantiate this contention sets forth (page 5 and 6 of its brief) a distorted and false paraphrasing of a statement from the *Keppel* case.

It is apparent that the statement was paraphrased instead of being quoted in *toto* for the sole and only purpose of misleading this Court to the erroneous and false conclusion that the *Keppel* case held that the use of a chance devices in intrastate commerce to distribute merchandise is within the purview of the Federal Trade

Commission Act. A glance at the statement unparaphrased will emphasize the distortion and the falseness not only of the paraphrasing but, also, of the contention made.

The statement from the *Keppel* case is as follows:

> "The practice in this case presents the same dilemma to competitors, and we can perceive no reason for distinguishing between the element of chance as employed here and the element of deception involved in labelling cotton goods 'Natural Wool', as in the *Hinsted* Case. It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. *But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves.* It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal satatutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair'." (Italics provided)

It should be noted that the Court in the *Keppel* Case found the presence of fraud and deception; two factors which it is admitted are not present in the case at bar.

The Commission's use of the pronoun "them" at the top of page 6 is for the purpose of making it appear that this Court in the *Keppel* Case said,

> It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction to hold that *devices whereby the return for one's money is depent upon chance* is not unfair.

Whereas, it is self-evident from the above quotation from the case that the practice the Court was referring to when it said,

> "It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction to hold that the method is not unfair"

is not a chance device but was the method used by Keppel of so packing an assortment of candy in such a manner that when the candy was sold to the consumer the purchasers thereof would purchase a piece of candy for 1¢, and if this piece had a colored center the purchaser was given in addition a larger bar of candy. The proceeding was against this method of so packing the candy, it was not against any device. There is no such method in the case at bar.

The quotation makes it clear that the holding in the *Keppel* case is not that the use of a chance device is a violation of the act but it shows clearly that the holding is restricted, limited and confined to the principle of law that *a competitor can not use a method of competition in interstate commerce which casts upon his interstate competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt.* Therefore, the *Keppel* case does not hold, as the Commission would lead this

Court to believe, that the use of chance devices in the intrastate distribution of merchandise is an unfair method of competition or an unfair act or practice within the act.

As the Commission concedes that the petitioners' acts do not place their competitors in such a situation and it appearing that this is the only principle announced in the *Keppel* Case it is conclusive that the *Keppel* Case does not govern the case at bar.

Concerning the application of the *Keppel* Case to a case like the one at bar the Seventh Circuit in the case of *Modernistic Candies, Inc.*, v. *Federal Trade Commission*, 145 F. (2) 454, 455 expressly held that the *Keppel* Case does not govern cases like the one at bar. The court said:

> "The *Keppel* Case, however, does not cover the case at bar because the article sold here, the Ballgum board, is incomplete in itself as a game of chance. No prizes are provided."

The court below did not cite the Keppel case as governing herein, but cited it only on a principle of statute construction.

If the *Keppel* Case were to be construed to hold as the Commission contends it does, that is, that the intrastate use of chance devices is a violation of the statute the *Keppel* Case and the *Bunte* Case would be in direct conflict with each other. The Commission makes no claim that these cases are in conflict. The Commission as did the court below, as petitioners will show hereinafter, just refuses to recognize that the *Bunte* Case held that intrastate transactions are not within the purview of the act.

The above establishes beyond doubt that the *Keppel* Case did not hold as claimed by the Commission that the intrastate use of "*devices whereby the return for one's money is dependent upon chance*" is a violation of the Federal Trade Commission Act.

The Commission's next point (page 6 of its brief) would lead this Court to believe that all of the cases cited in the footnote on said page are in point herein.

The following quotation from page 6 of the Commission's brief while it may not be a direct misstatement of the holding in these cases it is most certainly misleading.

> "Orders of the Commission directed against interstate distribution of goods or products designed to promote sale at retail to consumers by appeal to the gambling instinct have been repeatedly before the various court of appeals."

As this statement worded as it is appearing in a case as it does, wherein punch boards are involved it is reasonable to assume that the Commission intended the statement to mean that the merchandise in those cases was designed in a manner identical or almost so as punch boards are designed to promote sales. This is far from the true fact. The difference between the two is this: In these cases cited in the foot note the goods or products were so packed and designed that their sales, not the sales of other goods, were to be made by gambling, that is the goods and products were so packed that the gambling feature was limited to the sale of those particular goods and products packed in the assortment. The parties proceeded against in these cited cases by using this practice and method as in the *Keppel* case placed their competitors in a position of loss of business unless they would descend to a practice which they were under a powerful moral compulsion not to adopt. While on

the other hand, petitioners sell only punch boards. Petitioners by doing so do not place their competitors in such a position or situation.

. All of these cases were decided on the identical principle of law announced in the *Keppel* case, therefore what is said above about the *Keppel* case and what will be said hereinafter about it applies to these cases with the same force and effect as it does to the *Keppel* case.

From that which is set out on page 12 of our brief, on the bottom of page 7, the bottom of page 8, and top of page 9 of the Commission's brief, it is inescapable that the application of the principle that one who aids, abets, procures and induces others to violate the Federal Trade Commission Act is himself a violator thereof to the case at bar as was done by the court below is in direct conflict with this Court's holding in the *Bunte* case.

To show the fallacy of applying the above principle to the case at bar it is important to set out the undisputed facts. From that which is set out on the pages of the briefs set out above it, also, appears that the undisputed facts herein are: that the order to cease and desist issued herein restrains the petitioners from shipping in interstate commerce only punch boards, no other merchandise, *to people who use them exclusively in intrastate commerce;* that these intrastate transactions have no effect in interstate commerce; that the petitioners' acts are not in themselves *per se* unfair acts or practices within the intent and meaning of the Federal Trade Commission act; that they are not unfair to competitors, purchasers or consumers; that there is no fraud or deception herein; that the Court below held that the only reason that the petitioners' acts are unfair, is because the petitioners, by shipping the devices in question so aid, abet, procure,

and induce others to violate the act; *that the court predicated its decision in sustaining the Commission's jurisdiction to issue the order herein on the sole and only principle that the intrastate use of punch boards to distribute merchandise is a violation of the Federal Trade Commission act (contrary to the Bunte case)*; and that petitioners because they ship only punch boards, no other merchandise, in interstate commerce so aid, abet, these intrastate transactions that they themselves come within the act; that the *Bunte* case held that intrastate transactions are not a violation of the act.

All of the above facts being admitted it is self evident that because this Court held in the *Bunte* case that these intrastate transactions are not a violation of the Federal Trade Commission Act, the contrary holding by the lower court herein that they are a violation of the act and, also, holding that the petitioners by aiding abetting, inducing, and procuring these said acts are themselves violators of the statute is in direct conflict with the holding in the *Bunte* case; under the *Bunte* case there is no violation therefore there is no aiding, abetting, procuring, and inducing.

In a foot note on page 9 of its brief, the Commission relies on four cases to sustain the erroneous principle of aiding, abetting, procuring, and inducing. These cases to some extent do sustain this contention. However, the following short discussion of each case will show that the theory upon which they are predicated is in direct conflict with the *Bunte* case.

The first one of these cases is the *Modernistic Candy, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454.

The court on page 455 says:

> "We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into insulated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole. If the Federal Trade Commission is to police merchandising by gambling, it must police those who designedly and *deliberately aid and abet this practice. We think the Commission has such power.*" (Italics provided)

Thus it is obvious that this holding is based upon the theory that the Commission is to police the intrastate merchandising by gambling. The court's holding that the Commission has such authority as we have shown above is in direct conflict with the *Bunte* case. As the Commission has no authority to police intrastate merchandising by gambling it has no authority to police the ones who furnish only the punch boards to those who use them in intrastate commerce because these people do not violate the act. It is fundamental that the Seventh Circuit's holding that the Commission is to police the intrastate merchandising of gambling is contrary to and in direct conflict with the *Bunte* case. It is axiomatic that if there is no violation of the Federal Trade Commission Act there is no aiding, abetting, procuring, and inducing.

It is unfortunate that the *Bunte* case was not called to the court's attention in the *Modernistic* case. Had this been done undoubtedly the court would not have held as it did.

The court in the *Brewer* case, the next case cited by the Commission says:

> "For the reasons hereinafter appearing, we have reached the conclusion that, in thus *aiding and abetting, inducing and procuring* manufacturers and wholesale and retail dealers in merchandise to use *unfair or deceptive acts or practices and unfair methods of competition*, Charles A. Brewer and Son, though manufacturing no merchandise except the lottery devices which they ship in interstate commerce, fall within the restraining power of the Federal Trade Comission Act. (52 Stat. III.)" (Italics provided)

Thus it is seen that the Sixth Circuit assumed, contrary to this Court's holding in the *Bunte* case, that the intrastate use of punch boards to distribute merchandise is an unfair method of competition and unfair acts and practices within the meaning and intent of the Federal Trade Commission act and on this premise proceeded to hold erroneously that one who aids, abets procures and induces others to commit such intrastate transactions is himself a violator of the act.

As this theory is the sole and only basis upon which the court predicated its holding sustaining the Commission's jurisdiction to issue the order therein, the fallacy of such a holding is self evident because under the *Bunte* case there is no violation, therefore, there is no aiding, abetting, procuring, and inducing.

Unlike the *Modernistic* case the *Bunte* case was cited to the Sixth Circuit in the *Brewer* case. In applying the holding in the *Bunte* Case to the facts in the *Brewer* case, the court said:

> "The main reliance of petitioners is upon the opinion of the Supreme Court in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349. It was

there held that the Federal Trade Commission is without authority under Section 5 of the Act to prevent an Illinois candy manufacturer from selling wholly within that State candy in 'break and take' packages, making the amount the purchaser receives dependent upon chance. In the concluding paragraph, the writer of the majority opinion said it was merely held that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce', requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished. The case is plainly distinguishable from that at bar, in that, in the *Bunte Brothers* case, the sale of the petitioner's products was entirely within the State of Illinois. Here, the petitioners ship in interstate commerce throughout the United States their manufactured lottery devices"

On this point the Commission on page 9 and 10 of its brief says:

"Petitioners rely upon *Federal Trade Commission* v. *Bunte Bros., Inc.,* 312 U. S. 349, which involved an order under Section 5 directed against a concern which sold only in intrastate commerce. The holding there that Section 5 is limited to practices employed 'in' interstate commerce and does not extend to practise which merely affect such commerce has no application here. Petitioners sold their punch boards and push cards in interstate commerce, so that there is clear jurisdictional basis for the proceeding against them."

Such a narrow and limited interpretation of the *Bunte* case applied to the case at bar is clearly erroneous because it does not only fail to recognize that this Court held in the *Bunte* case that the intrastate use of punch boards is not a violation of the Federal Trade Commission Act, but, it also, nullifies and treats at not the

significance and importance of such a holding. As the jurisdiction of the Commission to issue a cease and desist order in the case at bar is predicated and based solely upon the theory that one selling punch boards to people who use them exclusively in intrastate commerce is within the purview of the Federal Trade Commission Act, the fallacy of such a narrow interpretation and application of the holding in the *Bunte* case is self evident in the face of the following facts:

(1) that the Court in the *Brewer* case relied solely upon the principle that the intrastate transactions are a violation of the Federal Trade Commission Act, and that the petitioners by furnishing the punch boards used in these intrastate acts also violated the act.

(2) that to sustain such a holding the vital, crucial, and indispensable fact is that these intrastate transactions must be a violation of the statute because if they are not there can be no aiding, abetting, procuring, and inducing a violation of the act;

(3) that this Court held in the *Bunte* case that such intrastate transactions are not a violation of the act.

Instead of applying the holding in the *Bunte* case as it should have to the theory relied upon the Sixth Circuit in the *Brewer* case erroneously relied upon several other cases. The following discussion of which will reveal that these cases are not in point. To sustain its holding that the case at bar is controlled by the theory of aiding, abetting, procuring and inducing, the court in the *Brewer* case quote the following from the case of *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483.

> "And they (the facts in the case) show also that the *practice constitutes an unfair method of competition as against manufacturers of all wool knit*

underwear and as against those manufacturers of mixed wool and cotton underwear who brand their products truthfully, or when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods." (Italics supplied)

The court quoting further:

"The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his market for the honest product. *That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.*" (Italics supplied).

"For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the *producer* of truthfully marked goods." (Italics provided.)

This quotation when the holding in the *Bunte* case is considered certainly does not sustain the holding made by the Sixth Circuit Court. The holding in the *Winsted* case is confined to the same rule of law as is announced in the *Keppel* Case, therefore, what has been said about the *Keppel* case applies to the *Winsted* case.

The Sixth Circuit seems to rely not so much on the *Winsted* case as it does on the rule of law of unfair competition, "*That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition,*" as announced in the *Winsted* case. This rule of law does not support the holding that the intrastate use of punch boards to distribute merchandise is an unfair act and furthermore it has no application to the case at bar,

because it is based upon fraud and deception, neither of which are present herein. This rule of law is not in point where there is no fraud or deception present. Most of the other cases cited by the court in the *Brewer* case fall in the category of the *Keppel* case so that which has been said about the *Keppel* case applies with equal force and effect to all of them.

Another reason why the *Winsted* case, and the rule of law of unfair competition have no application to the case at bar is, because in all those cases wherein the rule is applied the proceedings are against the *use* of the method, act or practice in selling merchandise. It is the method, act or practice used to sell the products that is restrained not the mere selling of the product itself. While on the other hand, in the case at bar the order is not against the *using* of any method, act or practice by which the punch boards are sold, but the order restrains the selling and shipping of the boards.

Section 5 of the Federal Trade Commission Act on this point provides as follows:

> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from *using* unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce" (Italics provided)

Thus it is seen that the *Brewer* case is in direct conflict with the *Bunte* case, therefore, the Ninth Circuit herein was in error in relying upon it.

In addition to that which we have said about the *Globe* case in our brief let us add the following. The following statement in the *Globe* case seems to the petitioners to be inconsistent with each other:

> "The instant proceeding no doubt would have been beyond the jurisdiction of the Commission under the

> unamended Federal Trade Commission Act, as interpreted by the Supreme Court in *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643 (1931)."

The second statement is:

> "The opinion in the *Brewer* case relies in part on the common law rule of unfair competition that one who furnishes another with the means of consummating a fraud is himself a wrongdoer. See *Coca-Cola Co.* v. *Gay-Ola Co.*, 200 Fed. 720 (C. A. 6, 1921); see also *Federal Trade Commission* v. *Winsted Co.*, 258 U. S. 483 (1922). We agree that the above-stated rule can be applied as an apt analogy here."

It is beyond the comprehension of the petitioners to determine in what manner the amendment of 1938 so changed the act as to bring the application of the rule of unfair competition into existence.

From the quotation above it will be noted that the *Winsted* case was decided in 1922 but the Commission not until after the amendment of 1938 ever contended that this rule of law should apply.

The *Hamilton* case cited by the Commission does not discuss these questions. The only question urged in that case was that the order was too broad, therefore, it should be modified, which the Court therein did.

From that which we have set out hereinabove it is clear that the opinion above is in conflict with this Court's holding in the *Bunte* case.

The Rule of Aiding and Abetting Is not Applicable to the Federal Trade Commission Act.

Petitioners make the further contention that it is a violation of the rule of strict construction to apply the rule of aiding and abetting to the Federal Trade Commission Act.

The Court below and Commission on page 9 of its brief on this point places considerable emphasis on that which was said in public Law 906, 81st Congress, 2d session, the socalled slot machine law. If the passing of this law has any significance with regard to the case at bar, it seems to the petitioners that its application should favor petitioners' contentions instead of being adverse to them. If Congress intended to have the intrastate use of punch boards stopped, this law would have included a proper provision covering the subject. This law, in excluding from its provisions the shipping of slot machines into states wherein their use is legal, emphasizes that Congress has a definite policy not to prohibit the interstate shipping of merchandise into a state wherein the use of it is not illegal. Congress has always been very careful to observe this rule. However, the application of the rule that the aiding and abetting of acts committed exclusively in intrastate commerce is a violation of the Federal Trade Commission Act violates this policy, because the cease and desist order herein restrains the shipment of punch boards into states wherein their use is not illegal or against the public policy of the state; many states and subdivisions thereof have expressly legalized the use of punch boards and taxed them. Notwithstanding this, the Commission claims the power to stop their shipment into those states. Before it can be inferred that Congress intended to grant to an administrative body the power to stop the interstate shipment of merchandise into states wherein the use thereof is legal the language used in the statute must be unequivocal. That such a holding can only be made wherein the language in the statute is clear and unequivocal is emphasized by the fact that Congress excluded such shipments from the provisions of Public Law 906. Congress has always consistently and emphatically maintained such a policy.

The Rule of Aiding and Abetting Is in Conflict with the Case of Scientific Manufacturing Company Inc. v. Federal Trade Commission, 124 F. 2d 640.

The petitioners contend that the case of *Scientific Manufacturing Company, Inc.* v. *F. T. C.*, 124 F. (2) 640 is in conflict with the cases relied upon by the Commission. The *Brewer* case said concerning the *Scientific* case:

> "The opinion in *Scientific Manufacturing Co.* v. Federal Trade Commission, 124 F. (2d) 640 (C. C. A. 3), apparently conflicts with that in *Modernistic Candies, Inc.* v. *Federal Trade Commission, supra,* with which we find ourselves in accord. The *Scientific* case may perhaps be differentiated on the fact that, in selling pamphlets derogatory of aluminum cooking utensils, the petitioner in that case did not deal in devices but 'dealt' as stated by the court, 'in opinions and no more.' "

However, the Third Circuit, the same court wherein the *Scientific* case was decided, in the *Globe* case distinguished it.

But the Ninth Circuit herein says this about it.

> "The case of *Scientific Mfg. Co.* v. *Federal Trade Commission,* 124 F. 2d 640 (Cir. 3), made it clear that trade practices were the sole concern of the Commission."

In spite of what the Third Circuit said in the *Globe* case in distinguishing the *Scientific* case the petitioners contend that the following quotation from the *Scientific* case is still the law and is still in conflict with the principle of aiding and abetting.

The court says:

> "The Commission contends that its jurisdiction in the circumstances shown derives from the amendment of March 21, 1938, (c. 49 Sec. 5 (a), 52 Stat. 111, 15 U. S. C. A. sec. 45 (a)) which enlarged the original

Federal Trade Commission Act by adding thereto a denouncement of 'unfair or deceptive acts or practices in commerce' and by correspondingly empowering and directing the Commission to prevent the use of such acts, or practices. From this, the Commission argues that the petitioners, being commercially engaged in an interstate business (the sale and distribution of pamphlets) are amenable to the Commission's interdictions when any of their acts or practices are found by the Commision to be unfair or deceptive in respect of some article of commerce in an *unrelated trade and notwithstanding such acts or practices are neither unfair nor deceptive in respect of the petitioners' trade in interstate commerce.* * * * *Obviously, a grant of power so vast is not to be accorded an administrative body except upon legislative direction within constitutional bounds. This brings us then to the matter of congressiqnal intent for first consideration.*" (Italics provided).

The court also said:

"None the less, it was still the unfair acts of traders in the affected commerce that the Commission was empowered to enjoin * * * But the restrainable acts or practices in commerce continued to be such as are performed or perpetrated in the trade affected by the offenses, whether or not there is competition. In short, the Commission's intervention is limited to acts or practices in the affected trade. If the amendment were given any broader scope, the Act would relate to far more than trade practices * * *"

There Is a Conflict Among the Circuit Courts as to what Principles Should Govern Herein.

The Commission on page 7 of its brief announces a rather peculiar theory as to what is unfair within the meaning of the act. On this point in the *Globe* case the court said: "All the Commission need show now is that

there is an act or practice in commerce inimical to the public interest." The *Brewer* case by failing to comment on this principle by implication rejects it. However the court below herein expressly repudiates and doctrine, the Ninth Circuit says:

> "Nothing in the criminal proceeding of *United States* v. *Perry Halseth,* U. S. , decided January 7, 1952, question this saving clause respecting such power of the Commission as was exercised in the civil case of *Brewer* v. *Federal Trade Commission.* Nowhere has the Commission claimed the power to prohibit the transmission of such lottery devices in interstate commerce as such. The cases construing similar cease and desist orders have all concerned the use of lotteries in merchandising. *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 44 (Cir. 3) is similarly limited and should not be construed as conferring a general power over lotteries as such. The case of *Scientific Mfg. Co.* v. *Federal Trade Commission,* 124 F. 2d 640 (Cir. 3), made it clear that trade practices were the sole concern of the Commission."

For the reasons hereinabove petitioners respectfully request that their petition be granted.

Respectfully submitted,

F. W. JAMES,
Attorney for Petitioners.

GEORGE E. LINDELOF, JR.,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 83

LEO LICHTENSTEIN, LIBBIE LICHTENSTEIN and BYRON J. LICHTENSTEIN, individually and trading as Harlich Manufacturing Company and Loomis Manufacturing Company,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petition for Rehearing

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the above named petitioners and respectfully petition the Court for a rehearing hereof for the following reasons.

PETITION FOR REHEARING.

This petition is based upon the ground that the opinion in the Court below violates all of rules of statutory construction announced by this Court.

Petitioners in their brief herein in support of their petition for a writ of certiorari and in their reply brief herein relied primarily on the point that the decision in the United States Court of Appeals in the Ninth

Circuit herein is in direct conflict with this Court's holding in the case of *F. T. C.* v. *Bunte Brothers,* 312 U. S. 349.

Petitioners now as a basis for the granting of the writ of certiorari present the following grounds which is available to them and which was not presented heretofore because of petitioners' faith in the correctness of their other contention. In approaching this additional ground it seems important to make the following observations.

In the two briefs already filed herein petitioners clearly demonstrated that the case of *F. T. C.* v. *Keppel Brothers, Inc.,* 291 U. S. 304 and all cases following the *Keppel* case and also the rule of law pertaining to unfair competition, "That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition", are confined to the principle of law that "a competitor cannot use a method of competition in interstate commerce which casts upon his interstate competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt". It has also been shown that this principle of law has no application to the case at bar because the complained of acts herein do not place petitioners' competitors in a position which casts upon them the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt.

Another important fact to be considered in this discussion is that it is admitted that petitioners' said acts are not unfair to consumers, purchasers or anyone else. In fact, the sole basis upon which the said acts are held by the Court below to be unfair within the intent and

meaning of the Federal Trade Commission Act is stated by the Court as follows, to wit;

> "• • • we are of the opinion that the petitioner's use of interstate commerce to ship these devices to be used in intrastate commerce in the gambling disposition of merchandise to the ultimate consumer is one of the 'unfair • • • practices in commerce' subject to the preventive control of the Commission."

That to thus construe the Federal Trade Commission Act violates and is contrary to every principle of statutory construction announced by this Court is made self evident by the following application of the facts in the case at bar to the statutory prohibitory powers granted to the Commission by Congress. The following discussion will not only show that the construction placed upon the Federal Trade Commission Act by the Ninth Circuit Court of Appeals is a clear violation of all of the rules of statutory construction but will also establish that there is absolutely no basis upon which to predicate a holding that the petitioners' complained of acts are unfair trade practices or unfair in any manner whatsoever within the meaning and purview of the Federal Trade Commission Act.

In the beginning of our discussion it is well to set out that all of the prohibitory powers granted to the Commission are found in the following provisions of the statute:

> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, • • • from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce".

In order to determine whether or not there is a basis for holding that the furnishing of punch boards to be used

in intrastate distribution of merchandise comes within the above provisions, it becomes necessary not only to look at the facts in the case at bar but we must in addition understand all of their ramifications. The first important aspect of the effect of these intrastate transactions is that they have absolutely no effect on interstate commerce. The Commission made no finding of fact to this effect and makes no contention that these transactions have any effect whatsoever on interstate commerce. Therefore, giving full force and effect to the dissenting opinion in the case of *F. T. C.* v. *Bunte Brothers, Inc.*, 291 U. S. 304, and by virtue of the holding in the case of *Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495, the Commission does not have power to proceed against or to issue a cease and desist order against these intrastate transactions, that is, if the Commission should after a proceeding issue an order to cease and desist against a local tavern owner restraining him from using punch boards to distribute merchandise in exclusively intrastate commerce this Court would promptly set aside said order. Therefore, this being the status of these intrastate transactions by what logic can it be said that by inference Congress intended by the provisions of the Federal Trade Commission Act to give the Commission power to stop the furnishing of only the punch board used in such transactions. This construction is certainly based upon only an inference because there is no express grant of power over the interstate shipment of punch boards. There would be, maybe, some basis for such an inference if these interstate transactions had either a detrimental effect on interstate commerce or were a violation of the Federal Trade Commission Act, but it is admitted that these transactions do not affect interstate commerce and that they are clearly not a violation of the Federal Trade Commission Act. In this regard it should be pointed out

that the Courts in the cases of *Chas. A. Brewer & Son*, v. *F. T. C.*, 158 F. 2nd 74; *Modernistic Candy, Inc.* v. *F. T. C.*, 145 F. 2d 454; *Globe Cardboard Novelty Co.* v. *F. T. C.*, 192 F. (2) 444 and the Ninth Circuit Court of Appeals in the case at bar predicated their interpretation of the statute on the erroneous principle that these intrastate transactions are within the purview of the Federal Trade Commission Act. Therefore, when it is admitted, as it must be, that these intrastate transactions are not a violation of the statute the above cases are clearly erroneous and therefore should not be followed.

From the above it is self-evident that there is no basis, reason or logic upon which to predicate an inference that Congress intended to give the Commission jurisdiction to restrain the interstate shipment of punch boards which are to be used for the distribution of merchandise, when the intrastate transactions have absolutely no effect on interstate commerce.

In addition to the fact that such interpretation of the statute is a violation of all the rules of statutory construction, such interpretation also violates many of Congress' avowed policies. This construction violates Congress's policy of not unduly interfering with the police powers of the State. In view of the tenth amendment to the Constitution, Congress advisedly adopted and maintained a policy of not interfering with strictly intrastate affairs. For this reason it seems to petitioners that the intrastate use of punch boards to distribute merchandise cannot be used as a basis for the inference that Congress intended to give the Commission jurisdiction to stop the aiding, abetting, procuring and inducing the commission of these intrastate transactions. This is especially true when it is borne in mind that many states and sub-divisions thereof have expressly legalized such use of punch boards. This interpretation of the statutes amounts to saying

that Congress has said to the States that no matter whether a State or sub-division thereof has placed its stamp of approval upon the use of punch boards to distribute merchandise Congress nevertheless characterizes such transactions as being of such a nature that they must be prohibited or that Congress will use every means within its power to stop such transactions. Congress has never intended to so characterize a strictly intrastate transaction.

This interpretation of the statute also violates Congress's avowed policy that when Congress wishes to stop the interstate shipment of any merchandise because of its detrimental intrastate effect Congress has always done so by an express and unequivocal enactment. The express provision of the Federal Trade Commission Act is that the Commission has power to restrain *"the using of any unfair method of competition or unfair or deceptive acts or practices in Commerce"*. However, the order herein is not directed at the using of any method, act or practice but is directed against the shipping of a product.

CONCLUSION.

Wherefore, petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to It for review of the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

F. W. JAMES,
Attorney for Petitioners.

GEORGE E. LINDELOF, JR.,
Of Counsel.

CERTIFICATE.

Comes now the undersigned, one of the attorneys for the petitioners herein and hereby certifies that this Petition is presented in good faith and is not interposed for delay and further certifies that this Petition is restricted to a ground available to the petitioner although not previously presented.

F. W. JAMES.